STATE OF MICHIGAN

COURT OF APPEALS

SHARON ANN LOCKWOOD and DAVIE LOCKWOOD, Plaintiffs-Appellants, v DENNIS ARNOLD WNUK, Defendant-Appellee.	UNPUBLISHED February 21, 2003 No. 237088 Lapeer Circuit Court LC No. 00-027977-NI

Before: Bandstra, P.J., and Murphy and Griffin, JJ.

GRIFFIN, J. (*concurring*).

I concur in the result to reverse and remand for further proceedings. At this juncture, an outcome determinative factual dispute exists on the issue whether plaintiff sustained a threshold injury. *Kern v Bethlen-Coluni*, 240 Mich App 333, 341; 612 NW2d 838 (2000). I write separately, however, to express my disagreement with some of the analysis contained in the lead opinion.

First, I note that our review is hampered by defendant's failure to support his motion for summary disposition with admissible evidence as required by MCR 2.116(G)(6). *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999); *SCC Associates Ltd Partnership v General Retirement Systems of the City of Detroit*, 192 Mich App 360, 363-364; 480 NW2d 275 (1991). Rather than supporting his motion with depositions, affidavits, or other admissible documentary evidence, defendant relied solely on unauthenticated medical records that contain multiple levels of hearsay. Depositions of plaintiff and her treating physicians were never taken, and plaintiff's answers to defendant's requests for admission were signed by plaintiff's counsel, not by plaintiff.

Although defendant's motion for summary disposition should have been denied by the lower court on the ground that it lacked evidentiary support, plaintiff failed to object on this basis and in her response to defendant's motion for summary disposition, affirmatively agreed "that she [plaintiff] sustained injuries as detailed in the medical records, including, but not limited to, those injuries listed by Defendant in its (sic) Motion." Because, in general, a party may not benefit from an error of her own making, *Detroit v Larned Associates*, 199 Mich App 36, 38; 501 NW2d 189 (1993); *Bloemsma v Auto Club Ins Ass'n*, 190 Mich App 686, 691; 476 NW2d 487 (1991), I review plaintiff's appeal on the basis of the inadmissible documentary evidence submitted by the parties to the lower court.

In deciding a motion brought pursuant to MCR 2.116(C)(10), we review the evidence "in the light most favorable to the party opposing the motion." *Maiden, supra* at 120; *Quinto v Cross & Peters Co,* 451 Mich 358, 362-363; 547 NW2d 314 (1996). Further, in deciding motions for summary disposition, "[t]he court may not make factual findings or weigh credibility," *Manning v Hazel Park,* 202 Mich App 685, 689; 509 NW2d 874 (1993). "The fact allegations in the affidavits [depositions, admissions, or other documentary evidence] of the party opposing the motion must be considered to be true.'" *Bullock v Automobile Club of Michigan,* 432 Mich 472, 475; 444 NW2d 114 (1989), quoting with approval 7 Callaghan's Michigan Pleading & Practice (2d ed), § 43.12, p 30. Finally, our Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. *Maiden, supra* at 118.

After reviewing the unauthenticated medical records in the light most favorable to plaintiff, I agree with the lead opinion that the lower court erred in concluding, as a matter of law, that plaintiff's alleged closed-head injury did not constitute a serious impairment of body function. The medical records contain a diagnosis of "traumatic brain injury." Further, cognitive tests and evaluations that form the basis for the diagnosis are objective in nature, thereby leading to a conclusion that the injury is objectively manifested. *Jackson v Nelson,* 252 Mich App 643; 654 NW2d 604 (2002). However, it is not clear from the medical records whether plaintiff's closed-head injury *significantly* affected her general ability to lead her normal life as is required by the no-fault threshold, *Miller v Purcell,* 246 Mich App 244, 250; 631 NW2d 760 (2001).[1] In this regard, defendant failed to take plaintiff's deposition. The medical records submitted on this issue are contradictory and inconclusive. Thus, defendant has failed to sustain his burden of proof.

Next, in regard to plaintiff's alleged abdominal injury, I disagree with the conclusion of the lead opinion that the trial court erred in granting summary disposition on the no-fault threshold. By all indications, this injury was not serious.[2] *Hermann v Haney,* 98 Mich App 445, 449; 296 NW2d 278 (1980), aff'd 415 Mich 483; 330 NW2d 22 (1982).

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[1] To the extent that *Kreiner v Fischer,* 251 Mich App 513; 651 NW2d 433 (2002), implies that the effect of an injury on the plaintiff's general ability to lead her normal life need not be significant, such a proposition was rejected in the earlier and precedentially binding decision, *Miller, supra* at 250. See also *Cassidy v McGovern,* 415 Mich 483, 503; 330 NW2d 22 (1982):

> In determining the seriousness of the injury required for a "serious impairment of body function", this threshold should be considered in conjunction with the other threshold requirements for a tort action for noneconomic loss, namely, death and permanent serious disfigurement. MCL 500.3135; MSA 24.13135. The Legislature clearly did not intend to erect two significant obstacles to a tort action for noneconomic loss and one quite insignificant obstacle.

[2] My disagreement on this issue may be of little consequence because if plaintiff establishes a threshold injury, all of plaintiff's noneconomic damages are recoverable, *Byer v Smith,* 419 Mich 541; 357 NW2d 644 (1984); *Rusinek v Schultz, Snyder & Steele Lumber Co,* 411 Mich 502; 309 NW2d 163 (1981); *Warner v Brigham,* 90 Mich App 640; 282 NW2d 428 (1979). As our Court stated in *Warner, id.* at 643-644:

(continued…)

I join in the lead opinion on the remaining issues raised on appeal. I concur in reversing the summary disposition granted in favor of defendant and remanding for further proceedings.

/s/ Richard Allen Griffin

(…continued)

> A person *remains* liable for noneconomic loss if the injured person has suffered injuries which meet the threshold requirements. . . . Clearly any noneconomic loss compensable at common law may be recovered under § 3135. Once the threshold is crossed, the parties step from the purely statutory land of no-fault back into the common law, with all its virtues and shortcomings. [Emphasis in original.]

See also *Luce v Gerow,* 89 Mich App 546; 280 NW2d 592 (1979).